

Accordingly, this Court should deny the Motion to the extent it would prohibit Twentieth Century Fox from introducing evidence of its accounting for the Movie utilizing procedures other than under GAAP.

2. Response to Plaintiff's Motion In Limine No. 7 (the Gelb Survey Tape)

Plaintiff seeks to bar any testimony alleging that the videotape used by his expert Gabriel Gelb in conducting the Gelb survey, was not a fair representation of the November 28th ReBroadcast of Discovery Channel's *Behind Enemy Lines: the Scott O'Grady Story*. (Motion at 3-4). According to Plaintiff, Defendants experts Blair and Johnson did not criticize the videotape nor did they find it to be an inappropriate stimulus for the purpose of the Gelb Survey. (Motion at 4).

The referenced testimony from the experts, however, is immaterial. The questions posed to these experts regarding the appropriate "stimulus" is vague, ambiguous and does not address the real issue here which is the plain fact that Plaintiff cannot authenticate the Gelb tape. See Fed. R. Evid. 901 and 402. The tape Gelb used in the survey was the third tape he received. (Exhibit "A" Gelb Depo. at 29:15-18). The tape, labeled "November 28th Combined Discovery Channel" (marked as Exhibit 328 at the Gelb deposition), is a combination of tapes provided by Plaintiff's counsel to Gelb. (Exhibit "A" Gelb Depo. at 31:8-15) Gelb described his acquisition of the tape as follows:

Q. Okay. Do you know the source of Exhibit 328?

A. Is that the third tape?

Q. Yes, that's the third tape.

A. I don't know where the beginning portion came from, except that it was given to me by Mr. Flynn.

Q. Okay. And in fact, it's --the tape is labeled a combined -- November 28th combined Discovery Channel?

A. Yes, it is.

Q. Okay. So it's a combination of tapes?

A. I believe so.

Q. And were you told that by Counsel?

A. Yes.

Q. Okay. And what were you told?

A. That it was the original tape that I saw, plus they had gotten the front part of the program added to that tape.

Q. And do you know who added that to the tape?

A. No.

Q. And do you know where it came from?

A. No.

(Exhibit "A" Gelb Depo. at 31:3-23)

The tape used by Gelb in conducting his survey, therefore, was one cobbled or pieced together from tapes from different sources, the origin of which he does not know. Twentieth Century Fox therefore objects to the tape on the grounds of Rules 402, 403 and 901 of the Federal Rules of Evidence. Moreover, even if the tape is admitted into evidence, which it should not be, Twentieth Century Fox should not be precluded from challenging its admissibility or whether or not it is a "fair representation." *See, e.g., U.S. v. Jones*, 107 F.3d 1147, 1150 n.1 (6th Cir. 1997), *cert. denied*, 521 U.S. 1127 (decision of trial court to admit evidence does not bar challenging authentication before the jury). Accordingly, Plaintiff's attempt to avoid Twentieth Century Fox's challenge to the tape by way of this motion in limine should be denied.

3. Response to Plaintiff's Motion In Limine No. 10 (Reference to the First Amendment)

Plaintiff's Motion In Limine No. 10 seeks to bar Defendants from "discussing, referencing, or arguing the importance, scope, or impact of the First Amendment or that the works at issue in this case are protected by the First Amendment." (Motion at 5). Plaintiff claims that any such references would be irrelevant and prejudicial. *Id.*

Plaintiff's extraordinary request that Defendants be barred from discussing the First Amendment should be denied out of hand. Plaintiff does not cite any authority to support this request nor can any be found where, as here, Defendants have properly plead and briefed their defenses under the First Amendment. Moreover, there has been no finding by this Court that the First Amendment does not apply or that Defendants cannot try this case on the basis of this fundamental Constitutional defense. Accordingly, as there are no grounds or authority to support the Motion, it should be denied.

WHEREFORE, PREMISES CONSIDERED, Defendants request that this Court deny Plaintiff's Motions in Limine 6, 7 and 10.

Respectfully submitted,

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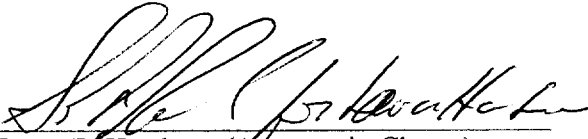
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CERTIFICATE OF SERVICE

This is to certify that on this 30th day of December, 2003, a true and correct copy of the foregoing Defendants' Response to Plaintiff's Motion in Limine and Brief in Support was served via United States Mail, postage prepaid, upon:

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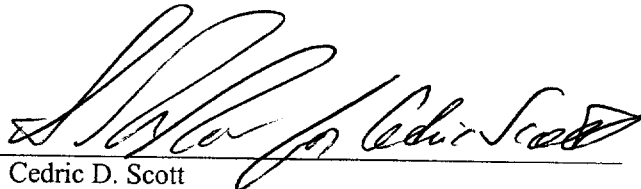

Cedric D. Scott

EXHIBIT A

Gabriel Gelb

June 19, 2003

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

SCOTT O'GRADY,

Plaintiff,

VS.

TWENTIETH CENTURY FOX
FILM CORPORATION, and
DISCOVERY COMMUNICATIONS,
INC.,

Defendants.

CIVIL ACTION NO. 502CV173

ORAL AND VIDEOTAPED DEPOSITION

GABRIEL M. GELB

JUNE 19, 2003

ORAL AND VIDEOTAPED DEPOSITION of GABRIEL M. GELB, produced as a witness at the instance of the Defendant, Twentieth Century Fox Film Corporation, and duly sworn, was taken in the above-styled and numbered cause on the 19th day of June, 2003, from 9:15 a.m. to 4:53 p.m., before Rhonda K. Ashman, CSR, RPR, in and for the State of Texas, reported by stenographic means, at the offices of Locke, Liddell & Sapp, LLC, 2200 Ross Avenue, Suite 2200, Dallas, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

Gabriel Gelb

June 19, 2003

<p style="text-align: right;">Page 6</p> <p>1 GABRIEL M. GELB, 2 having been first duly sworn, testified as follows: 3 EXAMINATION 4 BY MS. HAMILTON: 5 Q. Would you state your name for the record, 6 please. 7 A. Gabriel Michael Gelb. 8 Q. Mr. Gelb, you've been retained as an expert 9 in this case? 10 A. Yes, I have. 11 Q. And that is on behalf of the Plaintiff, Scott 12 O'Grady? 13 A. Yes. 14 Q. Let me hand you first what's previously been 15 marked as Exhibit Number 325, which is the notice of 16 deposition. And ask you if you've had an opportunity 17 to review that prior to today? 18 A. Yes, I have. 19 Q. Okay. And did you bring any documents with 20 you today? 21 A. No. 22 Q. Okay. Did you have an understanding 23 already -- communications with counsel regarding 24 production of documents relating to your work in this 25 case?</p>	<p style="text-align: right;">Page 8</p> <p>1 Q. And what cases were those? 2 A. I don't -- I don't remember offhand. 3 Q. Okay. What about false endorsement, have you 4 ever been retained as an expert to testify on matters 5 of false endorsement? 6 A. No. 7 Q. What is your understanding of what the 8 relevant population was? I think that was the term 9 that you were using. What -- what is the relevant 10 population that you were studying? 11 A. In my mind, the relevant population were 12 people who had access to the Discovery Channel in the 13 time period that the disputed program was shown. 14 Q. And how did you arrive at that determination? 15 A. Just seemed logical to me. 16 Q. No other reason other than it just seemed 17 logical? 18 A. That's correct. 19 Q. And how did you determine who -- and what was 20 the time frame that you're talking about? 21 A. Well, the disputed program was shown on 22 November 28th, 2001. So we wanted people who had 23 access to the Discovery Channel during that time 24 period and also were still watching the Discovery 25 Channel recently.</p>
<p style="text-align: right;">Page 7</p> <p>1 A. Did I have an understanding? 2 Q. Did you have a discussion with counsel about 3 production of documents that you worked on or that 4 were part of your work in relation to this case? 5 A. Yes. 6 Q. And have you produced all those documents? 7 A. To the best of my knowledge. 8 Q. Okay. How many times have you testified 9 before in trial? 10 A. In trial, about 10 or 12. 11 Q. Okay. And tell me what your understanding is 12 of your duties in this lawsuit. 13 A. To conduct a survey to determine whether or 14 not certain allegations by Captain O'Grady were 15 supported by the relevant population or not. 16 Q. And what were those allegations that you were 17 determining were supported or not? 18 A. Whether or not, after seeing the Discovery 19 Channel program, the relevant population believed that 20 Captain O'Grady was endorsing the Twentieth Century 21 Fox film, Behind Enemy Lines, and whether or not they 22 thought that that film told his story. 23 Q. Have you ever been retained as an expert 24 regarding false advertising claims? 25 A. I think so, maybe once or twice before.</p>	<p style="text-align: right;">Page 9</p> <p>1 Q. And why was it relevant, if at all, that they 2 were still watching the Discovery Channel? 3 A. Just so that they would be familiar with the 4 channel and still had access to it. 5 Q. Was there anything else that you considered 6 other than you were looking for people who had access 7 to the Discovery Channel as part of the relevant 8 population for your study? 9 A. Well, there were certain qualifications that 10 we screened for among those people who had access to 11 the Discovery Channel. 12 Q. And how did -- well, first of all, what were 13 those qualifications? 14 A. Those qualifications were people who had not 15 taken part in a research survey in the past six months 16 and -- let's see, that -- who -- who were part of any 17 entertainment company or video store. 18 Q. Any other qualifications? 19 A. No. 20 Q. What was the import, if anything, about 21 having people who had not taken part in a survey in 22 the last six months or past six months? 23 A. Well, you generally don't want people who are 24 professional surveyors, people who have been taking a 25 lot of surveys. You try to get a little bit more of a</p>

3 (Pages 6 to 9)

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Gabriel Gelb

June 19, 2003

<p style="text-align: right;">Page 26</p> <p>1 A. Then I received another tape, which 2 apparently came from Discovery Channel. 3 Q. And why do you say it "apparently came from 4 Discovery Channel"? 5 A. Well, I think it might have said DCI on it. 6 Q. Okay. Let me hand you this tape and see 7 if there's any way -- 8 MS. HAMILTON: Peter, also, I forgot to 9 ask. We need to have a -- I don't need it right this 10 minute. But if we could get a VCR. 11 Q. (BY MS. HAMILTON) Is that the tape that 12 you're referring to? 13 A. As I say, you have the advantage of me in 14 citing Bates numbers. That's -- 15 Q. Okay. 16 A. -- or -- 17 Q. Well, then I'll just wait until later and 18 we'll put it on the screen -- 19 A. Okay. 20 Q. -- and then you can -- 21 A. Great. 22 Q. -- tell me. 23 A. Okay. 24 Q. Would you hand it back to me? 25 A. (Witness complies.)</p>	<p style="text-align: right;">Page 28</p> <p>1 Q. And why did you have the opinion that you 2 couldn't show the second tape that was provided to 3 you? 4 A. As I recall, it did not have nonmovie 5 commercials in it. 6 Q. So it was not a complete program either? 7 A. That's correct. 8 Q. Did there come a time -- what was provided to 9 you after that, if anything? 10 A. A new set of tapes. 11 Q. And describe those tapes for me. They 12 were -- there were more than one tape? 13 A. There were eight tapes. 14 Q. And were they eight different tapes, or were 15 they eight of the same tape? 16 A. Same tape. 17 Q. Okay. And did you view that tape? 18 A. Yes, I did. 19 Q. Okay. And what was your assessment of that 20 tape? 21 A. In what sense? There was com- -- 22 Q. Did it meet the criteria? 23 A. It -- it was a complete tape. It was a 24 complete tape of the program. 25 Q. Let me hand you this tape. And again, we'll</p>
<p style="text-align: right;">Page 27</p> <p>1 Q. Thanks. 2 And at this point in time, other than 3 conferences with Counsel, you had looked at the 4 complaint and you had looked at the first tape that 5 was given to you that you said was sort of a truncated 6 beginning? 7 A. That's correct. 8 Q. Did you ask for any other materials? 9 A. No. I mean, I said, at that point, that we 10 did not have a tape that we could show. 11 Q. And you're referring to the first tape, that 12 truncated tape? 13 A. That's correct. 14 Q. And who did you have that conversation with? 15 A. Mr. Flynn. 16 Q. And what was the result of that conversation? 17 A. Well, he sent me this second tape and I had 18 the same reaction. 19 Q. And that's the tape that you referred to as 20 the DCI tape? 21 A. Yes. 22 Q. And why did you -- first of all, as to the 23 first tape, why couldn't -- why was it your opinion 24 that you couldn't show that tape? 25 A. It wasn't the complete program.</p>	<p style="text-align: right;">Page 29</p> <p>1 look at it, if you have to. Repre- -- represent to 2 you that that's my understanding of the tape that was 3 given to you by Counsel. 4 A. I believe -- 5 Q. That was one of the eight that -- one of the 6 eight tapes? 7 A. I believe it is. 8 Q. Okay. 9 MS. HAMILTON: Let's go ahead and mark 10 that. 11 You know what, you better put it on the 12 tape itself in case it gets out of the box. That's 13 328. 14 (Exhibit Number 328 marked.) 15 Q. (BY MS. HAMILTON) And so what has been 16 marked as Exhibit 328 is the -- I guess it was the 17 third tape that you received from Counsel? 18 A. Yes. 19 Q. Okay. And you said that it met the criteria. 20 What was the criteria? 21 A. It seemed to be a complete tape with the 22 opening talking about the movie and then seguing into 23 the Discovery Channel Scott O'Grady program with 24 commercials for other entities interspersed in the 25 tape, as well as additional advertising material on</p>

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June 19, 2003

<p style="text-align: right;">Page 30</p> <p>1 the movie itself.</p> <p>2 Q. And do you have an understanding of where</p> <p>3 this tape came from?</p> <p>4 A. Mr. Flynn.</p> <p>5 Q. Okay. Do you know whether it was produced by</p> <p>6 any of the parties or how did it -- you know, if you</p> <p>7 say strike one on the first tape that you got that was</p> <p>8 truncated, strike two on the second tape, the DCI tape</p> <p>9 because it didn't have the movie commercials, and then</p> <p>10 you go back, number three works, that -- that meets</p> <p>11 your criteria. Do you know how -- what the origin was</p> <p>12 of that tape?</p> <p>13 A. I know the origin of part of it.</p> <p>14 Q. Okay. And this is part of the tape which has</p> <p>15 been marked Exhibit 328?</p> <p>16 A. Is that the last tape?</p> <p>17 Q. Yes.</p> <p>18 A. It was my understanding that the last tape</p> <p>19 included the material that was in the original tape</p> <p>20 given to me.</p> <p>21 Q. It included the material in the original</p> <p>22 tape, but did it also include other material?</p> <p>23 A. No. You asked me what was in that tape. I</p> <p>24 said that what I know is that part of the tape was the</p> <p>25 same as I originally saw in the first tape and --</p>	<p style="text-align: right;">Page 32</p> <p>1 A. Yes.</p> <p>2 Q. Okay. You said it was important that the</p> <p>3 tape be complete. What do you mean by "complete"?</p> <p>4 A. I mean that the second tape apparently, as I</p> <p>5 said before, did not have commercials in it for other</p> <p>6 than the movie, so we did not have the localized</p> <p>7 retail and other commercials inserted in that.</p> <p>8 Q. Okay. And -- and why was it important to</p> <p>9 have those other commercials included in the tape?</p> <p>10 A. Because I wanted to show the respondents the</p> <p>11 tape as close to the actual program as we can get.</p> <p>12 Q. Okay. Did you make any efforts to locate</p> <p>13 other copies of this -- of the tape of the program as</p> <p>14 aired on December 28th -- I'm sorry, November 28th --</p> <p>15 A. No.</p> <p>16 Q. -- 2001?</p> <p>17 A. No.</p> <p>18 Q. So you made no independent effort to obtain</p> <p>19 the tape from Dec- -- November 28th, 2001?</p> <p>20 A. No.</p> <p>21 Q. Okay. But it was important to you that you</p> <p>22 show the participants the tape as aired on</p> <p>23 November 28th, 2001; is that correct?</p> <p>24 A. Yes.</p> <p>25 Q. And why was it important?</p>
<p style="text-align: right;">Page 31</p> <p>1 which I understand was made by one of Captain</p> <p>2 O'Grady's friends.</p> <p>3 Q. Okay. Do you know the source of Exhibit 328?</p> <p>4 A. Is that the third tape?</p> <p>5 Q. Yes, that's the third tape.</p> <p>6 A. I don't know where the beginning portion came</p> <p>7 from, except that it was given to me by Mr. Flynn.</p> <p>8 Q. Okay. And in fact, it's -- the tape is</p> <p>9 labeled a combined -- November 28th combined Discovery</p> <p>10 Channel?</p> <p>11 A. Yes, it is.</p> <p>12 Q. Okay. So is it a combination of tapes?</p> <p>13 A. I believe so.</p> <p>14 Q. Okay. And were you told that by Counsel?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. And what were you told?</p> <p>17 A. That it was the original tape that I saw,</p> <p>18 plus they had gotten the front part of the program</p> <p>19 added to that tape.</p> <p>20 Q. And do you know who added that to the tape?</p> <p>21 A. No.</p> <p>22 Q. And do you know where it came from?</p> <p>23 A. No.</p> <p>24 Q. Okay. But you were satisfied to take the</p> <p>25 tape that they had provided you?</p>	<p style="text-align: right;">Page 33</p> <p>1 A. To me it was -- obviously, if you're testing</p> <p>2 what the relevant population might take away from a</p> <p>3 program, you'd want them to see the program that was</p> <p>4 shown.</p> <p>5 Q. Okay. When you say the relevant population</p> <p>6 was taking away -- what they were taking away from the</p> <p>7 program?</p> <p>8 A. That's right.</p> <p>9 Q. And again, in your mind, the relevant</p> <p>10 population were just people who had access to the</p> <p>11 Discovery Channel through cable television; is that</p> <p>12 correct?</p> <p>13 A. Yes.</p> <p>14 Q. Did you consider the population of viewers of</p> <p>15 the Discovery Channel on November 28th, 2001?</p> <p>16 A. Would you repeat the question?</p> <p>17 Q. Did you consider the population that was</p> <p>18 watching the Discovery Channel on November 28th of</p> <p>19 2001?</p> <p>20 A. I thought about whether or not that would be</p> <p>21 possible to find those people, but then I gave that up</p> <p>22 as impractical.</p> <p>23 Q. Did you consider the demographics of the</p> <p>24 Discovery Channel of November 28th, 2001?</p> <p>25 A. No.</p>

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June 19, 2003

<p style="text-align: right;">Page 230</p> <p>1 I, GABRIEL M. GELB, have read the foregoing 2 deposition and hereby affix my signature that same is 3 true and correct, except as noted above. 4 5 6 <u>GABRIEL M. GELB</u> 7 STATE OF _____) 8 COUNTY OF _____) 9 10 Before me, _____, on this 11 day personally appeared GABRIEL M. GELB, known to me 12 (or proved to me under oath or through 13 _____) to be the person whose name is 14 subscribed to the foregoing instrument and 15 acknowledged to me that they executed the same for the 16 purpose and consideration therein expressed. 17 Given under my hand and seal of office this 18 _____ day of _____, 2003. 19 20 21 <u>NOTARY PUBLIC IN AND FOR</u> 22 <u>THE STATE OF _____</u> 23 24 25</p>	<p style="text-align: right;">Page 232</p> <p>1 the deposition, the Deponent _____, and/or the 2 Plaintiff/Defendant _____ did _____ did not _____ 3 request to review the transcript. 4 Certified to by me this _____ day of _____ 5 _____, 2003. 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;"> RHONDA K. ASHMAN, Texas CSR 5259 Expiration Date: 12-31-03 ESQUIRE DEPOSITION SERVICES 703 McKinney Avenue Suite 320 Dallas, Texas 75202 (800) 852-9737 </p>
<p style="text-align: right;">Page 231</p> <p>1 STATE OF TEXAS) 2 3 I, Rhonda K. Ashman, Certified Shorthand Reporter 4 in and for the State of Texas, do hereby certify that, 5 pursuant to the agreement hereinbefore set forth, 6 there came before me on the 19th day of June, A.D., 7 2003 at 9:15 a.m., at Locke, Liddell & Sapp, in the 8 City of Dallas, County of Dallas, and State of Texas, 9 the following named person to-wit: Gabriel M. Gelb, 10 who was by me duly sworn to testify the truth and 11 nothing but the truth of his knowledge touching and 12 concerning the matters in controversy in this cause; 13 and that he was thereupon carefully examined upon his 14 oath and his examination reduced to writing under my 15 supervision; that the deposition is a true record of 16 the testimony given by the witness, same to be sworn 17 to and subscribed by said witness before any Notary 18 Public, pursuant to the agreement of the parties. 19 I further certify that I am neither attorney or 20 counsel for, nor related to or employed by, any of the 21 parties to the action in which this deposition is 22 taken, and further that I am not a relative or 23 employee of any attorney or counsel by the parties 24 hereto, or financially interested in the action. 25 I further certify that before the completion of</p>	<p style="text-align: right;">Page 233</p> <p>1 COURT REPORTER DISCLOSURE STATEMENT 2 <input checked="" type="checkbox"/> Please be advised that pursuant to Rule IV.B4 of 3 the standards and rules for certification of Certified 4 Shorthand Reporters as promulgated by the Supreme 5 Court of Texas with regards to disclosure, I have no 6 existing or past financial, business, professional, 7 family or social relationships with any of the parties 8 or their attorneys which in some might reasonably 9 create an appearance of partiality. 10 11 Please be advised that Esquire Deposition 12 Services has entered into a volume-related discount 13 fee structure with a party in this lawsuit, and that 14 if such discount is in effect, all parties in this 15 case will receive the same discount for any like 16 product and/or service. 17 18 Please be advised that there is an existing or 19 past financial, business, professional, family or 20 social relationship with counsel involved in this 21 case, separate and apart from counsel simply doing 22 business with Esquire Deposition Services (or related 23 companies) in the past. 24 This relationship is: 25 _____ 26 27 Court Reporter: Rhonda K. Ashman, CSR, RPR 28 CSR Number: 5259 29 Date: June 19, 2003 30 31 <u>Rhonda K. Ashman, CSR, RPR</u> 32 33 CERTIFICATE OF SERVICE 34 This is to certify that a true and correct copy of the 35 foregoing disclosure statement has been presented to 36 all counsel present at the deposition, and a copy of 37 same will be attached to all transcript copies. 38 39 <u>Rhonda K. Ashman, CSR, RPR</u> 40 41 42 43 44 45</p>

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